DEVELOPMENT & COMMERCIAL BANK LTD

v.

DINESH KUMAR JASHBHAI NAGJIBHAI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-1082-1993]
8 MARCH 2002

CIVIL PROCEDURE: *Judgment - Setting aside - Application - To be made within 30 days of receipt of judgment under O. 42 r. 13 Rules of the High Court 1980 - Whether defendant must be served with judgment for said rule to apply - Whether defendant's mere knowledge of judgment entered against him sufficient for said rule to apply*

CIVIL PROCEDURE: *Judgment - Judgment debt - Interest rate - From judgment date until settlement - Whether rate should be as at date of judgment or as at date of recall of loan*

The first defendant's application to set aside a judgment in default ('default judgment') against him was dismissed by the Senior Assistant Registrar ('SAR') on the ground that the application did not comply with O. 42 r. 13 of the Rules of the High Court 1980 ('RHC'). That rule stipulates that a party intending to set aside a default judgment must do so within 30 days of receipt of the order or judgment against him. Hence, the first defendant's appeal.

The first defendant claimed that the default judgment was not served on him and that he only came to know of it when a bankruptcy notice was served on him. The plaintiff argued that the default judgment was not served on the first defendant as he had failed to enter appearance and therefore, pursuant to O. 62 r. 10 RHC, the default judgment need not be served on him. It was also argued that since the plaintiff was not obliged to serve the default judgment on the first defendant, O. 42 r. 13 RHC ought to be construed to mean that the 30 days began to run from the time he came to know of the judgment.

Apart from the above, in his affidavit in support of his application, the first defendant claimed that the amount of interest payable was not clear. He contended that the prescribed rate of interest should be as at the date of judgment whilst the plaintiff claimed that the prescribed rate of interest should be as at the date of the recall of the loan.

Held:

[1] If a plaintiff intends to use O. 42 r. 13 RHC to shut out a defendant, he must serve the judgment, otherwise the rule will not begin to operate as time has not begun to run against the defendant. There is no justification to read "within thirty days after the receipt of the judgment or order by him" as meaning within thirty days after he becomes aware of the judgment or order. The application should therefore have not been dismissed on that ground. (p 110 h-i)

[2] Section 3.10 of the loan agreement between the parties did not state that the prescribed rate of interest for the period was at the date of judgment. The prescribed rate for the relevant period was not qualified in any way. The effect of s. 3.10 of the loan agreement was that for the period from judgment until settlement, the same treatment was to be given as for the period before judgment. Therefore, the judgment should order interest from judgment at the prescribed interest as defined. However as that might render the judgment liable to be set aside on the basis of *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd*, the safe thing to do was to take a pragmatic approach of abandoning the proper construction of s. 3.10 and applying for the period the prescribed rate as at a particular date. As there appeared to be two dates, *ie*, the date of the recall of the loan and the date of the judgment, as a matter of justice to borrowers at large, either date should be alright. That is because in a particular case the base lending rate may be lower on that certain date than on the other and in another case it may be the other way around. (p 113 a-f)

[Default judgment regular; appeal dismissed with costs for plaintiffs; the order for costs made by the SAR was set aside as first defendant succeeded on the point upon which his application was dismissed.]

Case(s) referred to:

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 6 r. 6(3), O. 32 r. 13(2)(b), O. 42 r. 13, O. 62 r. 10

For the plaintiffs - DP Naban (Vicky Wong); M/s Lee Hishammuddin
For the defendant - Abd Fareed Abd Gafoor; M/s VM Mohan, Fareed & Co

Reported by Usha Thiagarajah

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JUDGMENT

Abdul Aziz Mohamad J:

This is the first defendant's appeal against the dismissal by the learned senior assistant registrar of his application to set aside the judgment in default that had been entered against him in this action. The application was dismissed because the senior assistant registrar found that the first defendant had not complied with O. 42 r. 13, which rule was introduced in 1993. It requires a party intending to set aside or vary an order or judgment to make and serve his application "within thirty days after the receipt of the order or judgment by him".

The judgment in default was given on 30 December 1993. It was not served on the first defendant, but he came to know of it when a bankruptcy notice was served on him on 17 November 1994. He first filed his striking-out application on 20 November 1995. By consent, that was withdrawn. He filed another on 23 July 1995, which was the one that was dismissed.

Relying on O. 42 r. 13 to shut out the first defendant's striking-out application, learned counsel for the plaintiffs argued that the judgment was not served on the first defendant because, the first defendant having failed to enter appearance, according to O. 62 r. 10 the judgment "need not be served on (him)", and since the plaintiffs were not obliged to serve the judgment on him, O. 42 r. 13 ought to be construed so that the thirty days began to run from the time he came to know of the judgment.

That argument did not propose that what O. 42 r. 13 means by "receipt of the order or judgment by him" is otherwise than receipt by the person concerned of the document that is called the judgment, which therefore would have to be served on the person, but what was argued was that the rule should be construed, not according to what it actually says, but so as to make it compatible with the fact that according to O. 62 r. 10 the judgment need not be served.

I think the actual meaning of the rule is not incompatible with the fact that the judgment need not be served, because the judgment may still be served, and if a plaintiff intends to use the rule to shut out a defendant, then he must serve the judgment, otherwise the rule will not even begin to operate because time will not even have begun to run against the defendant. There is no justification to read "within thirty days after the receipt of the judgment or order by him" as meaning within thirty days after he becomes aware of the judgment or order.

The application should therefore not have been dismissed on that ground.

Objection was taken against the use by the plaintiffs of an affidavit that was in reply to the first defendant's earlier striking-out application that the plaintiffs sought to use in reply to the first defendant's current application by a notice of intention to use the affidavit. The reason for the objection was because the notice of intention was served beyond the period allowed by O. 32 r. 13(2)(b) for serving an affidavit in reply. I do not intend to rule on this objection because this appeal can be disposed of without resort to that affidavit.

Learned counsel for the first defendant argued that the first defendant was not bound to respond to the writ and statement of claim because the writ and statement of claim that were served on him was a photostat copy which, although signed by the deputy registrar, was not sealed. Reliance was placed primarily on O. 6 r. 6(3). The trouble with this point is that it was not raised in affidavit so that the facts are not capable of being ascertained. Moreover, the court does not have sight of the actual writ and statement of claim that were served on the first defendant. The copy of the writ in the court file is certainly signed and sealed. Even if what was served was a photostat copy and not sealed, but it was signed by the deputy registrar, no authority has been cited that clearly establishes that there has been no service or the service is a nullity. I refrain from so ruling.

I now come to the only complaint raised by the first defendant in his affidavit in support of his application. He has not attempted to show that he has anything else to raise by way of defence.

The judgment was in the sum of RM7,085,95 3.96. According to the statement of claim (para. 5), the first defendant was indebted in that sum as at 30 June 1993, together with further interest accruing thereon at the rate of 12.5% per annum from 1 July 1993 until the date of payment. According to para. 6, on 6 July 1993 the plaintiffs, through their solicitors, demanded payment of the moneys outstanding. Learned counsel for the plaintiffs in his submission said that the first defendant was warned that if payment was not made within seven days, interest on that sum would be charged at the rate of 12.5% per annum. Although that is not in evidence, it must have been so, because that would have been the usual practice. The first defendant failed to pay and the plaintiffs filed this action.

The prescribed rate of interest is 3% per annum plus the base lending rate. According to evidence furnished by the first defendant himself, the base lending rate on 1 July 1993 was 8.5% and that continued until the end of July when it went down to 8.4%. It is clear, therefore, that on 1 or 6 July 1993, and on 13 July 1993, the end of the seven days given by the letter of demand of 6 July 1993, the prescribed rate was 11.5%. On top of that, the

plaintiffs were entitled by s. 3.09 of the loan agreement to an extra 1% interest above the prescribed rate as damages for default. So the interest chargeable then was 12.5%.

The judgment gave interest "pada kadar 12.5% setahun dengan kadar rehat bulanan dari 1 Julai 1993 sehingga tarikh penyelesaian". I may mention now that it is not true, as contended by learned counsel for the first defendant when he compared that manner of stating the rate of interest to what obtained in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, that the judgment is not clear as to the amount of interest. The judgment in this case does not suffer from the problem with the judgment in that case.

The complaint of the first defendant, as advanced in submission, is that even granting that the further interest of 1% is chargeable (which his counsel, incorrectly, said was not provided for) the rate of interest from judgment until settlement should be 11.85% and not 12.5% – a difference of 0.65% – because the base lending rate at the date of judgment was 7.85%. The complaint is based on that part at the end of the lengthy s. 3.10 of the loan agreement which provides that "in the event that a judgment is obtained ... wherein it is adjudged that any sum of money be paid to the bank, interest shall be payable on such sum of money ... at the prescribed rate from the date of such judgment until the date of full payment ...". Learned counsel for the first defendant submitted that based on that section the judgment should at least declare that interest be at the rate of 12.5% from 1 July 1993 until the date of judgment and at the rate of 11.85% from the date of judgment until settlement, meaning that if the judgment had been in those terms as regards interest, it would have been proper.

Obviously the first defendant's counsel construed that provision in s. 3.10 to mean that interest for the period from judgment until settlement should be at the prescribed rate as at the date of the judgment.

The reply of the plaintiffs' counsel was not directed to a construal of the provision. He said that because the notice of demand warned that interest would be charged at 12.5% if payment was not effected within seven days, and because the first defendant ignored the notice, the plaintiffs had a discretion to impose the rate of interest that was notified. He further submitted that the plaintiffs were entitled at the date of the default to interest at 12.5%, so there was no question of the judgment being in excess of the plaintiffs' entitlement. He further said that "it was essential to fix the rate prevailing at the date the loan facility was recalled to alleviate the uncertainty which might exist due to fluctuating base lending rates". See para. 3.2.5 of the plaintiffs' written submission.

I think that if the question were to be decided on a proper construction of that provision in s. 3.10, the result will not be as suggested by the first defendant's counsel. The provision says that "interest shall be payable ... at the prescribed rate from the date of such judgment until the date of full payment". Using exactly the same words, it could be put in another way: "From the date of such judgment until the date of full payment interest shall be payable ... at the prescribed rate". It does not say that the prescribed rate for the period is that at the date of the judgment. The prescribed rate for the period is not qualified in any way. Even for the period it must be as defined in s. 2.01 read with s. 3.05 of the loan agreement, that is according as the base lending rate may fluctuate during the period. In other words, the effect of that provision in s. 3.10 is that for the period from judgment until settlement, the same treatment is to be given as regards interest as for the period before judgment. Therefore, going by a proper construction of the provision, both the plaintiffs and the first defendant are wrong in their respective stands, and the judgment should order interest from judgment at the prescribed rate as defined, but that might render the judgment liable to be set aside on the basis of *Tuan Haji Ahmed Abdul Rahman*. So the safe thing to do is to take the pragmatic approach of abandoning the proper construction of the provision and applying for the period the prescribed rate as at a particular date. There appear to be only two dates, the date of the recall of the loan (letter of demand), as employed by the plaintiffs, and the date of judgment, as contended for by the first defendant. And I think that, viewing the matter indifferently as a matter of justice to borrowers at large, either date would be alright because in a particular case the base lending rate might be lower on the one date than on the other and in another case it might be the other way round. The first defendant in this case would not choose the date of judgment if the base lending rate on that date was higher than on 1 July 1993.

For those reasons I rule that the judgment is regular and dismiss the appeal with costs for the plaintiffs, but as the first defendant succeeds on the point on which the learned senior assistant registrar dismissed his application I set aside the order for costs made against him by the senior assistant registrar.